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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION SEVEN

SAMUEL R. JAFARI et al.,

Plaintiffs and Appellants,

v.

ROGELIO GASTELUM,

Defendant and Respondent.

B293034

(Los Angeles County Super. Ct. No. VC065766)

APPEAL from an order of the Superior Court of Los Angeles County, Lori Ann Fournier, Judge. Affirmed.

Law Office of Eric Anvari and Eric Anvari for Plaintiffs and Appellants Samuel R. Jafari and Fleets101 Inc.

Reich Radcliffe & Hoover and Adam T. Hoover for Defendant and Respondent.

Samuel R. Jafari and Fleets101 Inc. appeal the trial court's order awarding Rogelio Gastelum \$65,000 in attorney fees

pursuant to Civil Code section 3426.4 (section 3426.4) after Jafari and Fleets101 voluntarily dismissed their unverified complaint that included several causes of action based on Gastelum's alleged misappropriation of confidential information and trade secrets. Jafari and Fleets101 contend Gastelum's motion for fees was untimely, the court erred in finding Gastelum was the prevailing party on any contractual claims and substantial evidence does not support the court's findings that their misappropriation claims were brought in bad faith. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Jafari and Fleets 101's Complaint

Jafari and Fleets101 filed this lawsuit against Gastelum, Jafari's former business partner, on August 24, 2016. The unverified complaint alleged Jafari and Gastelum jointly formed Service Body Inc. in August 2008 and continued in business together until the end of 2010 when the company was dissolved. Jafari then started Fleets101, a commercial truck dealership and full service facility, offering customizable vehicles to its customers. Jafari hired Gastelum as Fleets101's operations manager.

The complaint further alleged that Gastelum had access to "confidential information concerning all of Fleets101's customers." In addition, Jafari and Fleets101 alleged, "As part of its business, Fleets101 has generated numerous trade secrets and confidential and proprietary information, including customer lists

Jafari and Fleets101 sometimes identify the company as "Fleets101" and at other times as "Fleets 101." For consistency, we use Fleets101, even when quoting from documents that insert the space in the name.

and information, that are the property of Fleets101. All of Fleets101's trade secrets were and are confidential."

According to the complaint, while working for Fleets101 Gastelum also worked part time for Custom Creations RV & Collision & Repair, a truck service and repair company. On November 24, 2014 Gastelum quit his position at Fleets101, began working at Custom Creations full time and eventually took over ownership and operation of Custom Creations. Before leaving Fleets101, however, Gastelum diverted business from Fleets101 to Custom Creations, thereby "usurp[ing] Plaintiff Fleets101's opportunity to continue business with customers." On information and belief, Jafari and Fleets101 alleged Gastelum "used his managerial position and knowledge of proprietary and confidential information to interfere with those established relationships and cause[d] Fleets101 economic harm, resulting in damages of at least \$200,000."

The complaint alleged six causes of action. The first cause of action, labeled "Contribution," was asserted only by Jafari and sought recovery of what Jafari alleged was Gastelum's 50 percent share of four payments he had made to satisfy obligations of Service Body's two equal shareholders.² The remaining causes of action for unfair competition, breach of fiduciary duty, intentional interference with prospective economic advantage,

Jafari identified payments pursuant to a January 1, 2008 commercial lease agreement for the property used by Service Body; a November 21, 2011 settlement agreement in an unspecified dispute, including fees owed the lawyer who represented them; a November 30, 2011 order of sums due the California Employment Development Department; and an October 6, 2015 settlement of a workers' compensation claim.

negligent interference with prospective economic advantage and misappropriation of trade secrets all focused on the allegations Gastelum had misappropriated trade secrets and other confidential information while working for Fleets101, including customer lists, to usurp for himself and Custom Creations Fleets101's longstanding business with its customers. As an example, Jafari and Fleets101 alleged Park West Inc., a customer of Fleets101 that generated approximately \$200,000 in annual revenue, began withdrawing business from Fleets101 when Gastelum left the business. On information and belief, they alleged, "[P]rior to Gastelum's resignation from Fleets101, Gastelum spoke with Park West Inc. in an attempt to entice the company to move their business to Custom Creations, Gastelum's new company."

Jafari requested just under \$85,000 for his contribution claim; and Jafari and Fleets101 sought actual damages for the remaining claims of at least \$200,000, plus restitution of all money wrongfully obtained by Gastelum through his unlawful, unfair and fraudulent business practices, as well as punitive damages and attorney fees.

2. Gastelum's Discovery

After answering the complaint, Gastelum served written discovery on March 22, 2017 (form interrogatories, special interrogatories, requests for production of documents and requests for admission). On May 18, 2017, after Jafari and Fleets101 had failed to respond to the discovery demands, Gastelum filed motions to compel. On May 26, 2017 Jafari and Fleets101 served their responses. Accordingly, at the hearing on the motions, the court ruled each motion was moot but awarded

Gastelum monetary sanctions of \$990 (two hours of attorney time at \$375/hour, plus \$240 in filing fees).

In special interrogatory number 23 Gastelum asked for details concerning his alleged misappropriation of trade secrets. In response (in separate but identical responses) Jafari and Fleets101 stated, "Over the course of its business, Fleets has generated numerous trade secrets and confidential and proprietary information, including private customer lists, leads, and information that are the property of Fleets and kept in a secure area away from the general public. . . . Access is given to managers and top-level employees only. . . . As Operations Manager, Gastelum had key access to the office and locked drawer [where confidential logs were kept]. Upon his resignation, Gastelum returned this key to Jafari. It was later discovered that certain log books were missing after Gastelum's resignation.

"Fleets provided Gastelum with a cell phone to conduct business. . . . After his resignation from Fleets, Gastelum continued using this phone to maintain contact with Fleets customers and leads for the purpose of drawing business away from Fleets and to Custom Creations, a company he worked at on a temporary basis since 2008 and has since taken over. Prior to his resignation from Fleets, Gastelum began plans to take over Custom Creations and for pushing business away from Fleets.

"Since Gastelum's resignation, certain Fleets vendors have been unable to supply Fleets with its usual demand of products, leaving Fleets unable to adequately provide for its customer demands. Fleets has also noticed an absence of frequent and regular customers. One such customer is Park West, who provided Fleets with approximately \$200,000 of business yearly.

Upon Gastelum's resignation from Fleets, Park West stopped supplying Fleets with business and instead began using Custom Creations."

3. Gastelum's Summary Judgment Motion and Jafari and Fleets 101's Dismissal of the Complaint

Gastelum moved for summary judgment on September 29, 2017. On November 27, 2017, just before their opposition to the motion was due, Jafari and Fleets101 filed a voluntary request for dismissal of the case without prejudice. The clerk entered the dismissal the same day. Neither the request nor the dismissal was served on Gastelum's counsel. On December 1, 2017, responding to an email inquiry from the prior day, Jafari and Fleets101's counsel emailed Gastelum's counsel a copy of the request for dismissal, stamped "received November 27, 2017" by the superior court. The clerk's entry of the dismissal was not reflected on that document.

4. Gastelum's Motion for Attorney Fees and the Court's Ruling

Following the dismissal of the action, Gastelum moved on May 21, 2018 for an award of attorney fees, contending Jafari and Fleets101 had filed their claims for trade secret misappropriation in bad faith and, therefore, were liable for attorney fees under section 3426.4. He also asserted, notwithstanding the voluntary dismissal, he was the prevailing party in an action on a contract with an attorney fee clause

Gastelum's counsel's November 30, 2017 email stated, "The docket shows that you filed a Request for Dismissal on Monday. We have not received a service copy. Please email it to me."

within the meaning of Civil Code section 1717. Gastelum sought fees of no less than \$198,380.

With respect to the contract claim Gastelum explained that the commercial lease payments for which Jafari sought contribution were due at the end of December 2010. In his responses to Gastelum's requests for admission, Jafari had admitted this claim, based on a lease agreement with an attorney fee provision, was barred by the statute of limitations. Although Jafari subsequently dismissed the entire complaint without prejudice, Gastelum argued, relying on the analysis of Division Five of this court in *Miller v. Marina Mercy Hospital* (1984) 157 Cal.App.3d 765, 768-769, he was entitled to recover fees incurred in defending the claim under Civil Code section 1717 because Jafari's admission conclusively established the claim was time-barred and carried the legal effect of resolving the issue at trial.

Gastelum contended the remaining five claims were all based on his alleged misappropriation of customer and vendor lists and related "confidential" information and pointed to Jafari and Fleets101's discovery responses to demonstrate they had no evidence to support those claims. Specifically, he asserted there was no evidence of his use or disclosure of any confidential information or the independent economic value of the purported trade secrets and no evidence of actual harm to Fleets101. As to subjective bad faith, Gastelum contended the lawsuit had been motivated by Jafari's intent to retaliate against Gastelum, who had testified in support of Fleets101 employees (some of whom were Gastelum's family members) in wage-and-hour proceedings before the Department of Labor Standards Enforcement (DLSE). As evidence, Gastelum pointed to Jafari and Fleets101's

discovery response that their damages include the sums paid to settle the DLSE actions.

Jafari and Fleets101 opposed the motion, arguing the motion was untimely because it was not filed within 60 days of Gastelum receiving an email copy of the request for dismissal; Civil Code section 1717, subdivision (b)(2), prohibits an award of attorney fees in contract claims if the lawsuit was voluntarily dismissed; the misappropriation of trade secrets cause of action was neither brought nor maintained in bad faith; and the \$650 hourly rate sought by defense counsel was unreasonable. In support of their contention they had acted in good faith in pursuing the misappropriation causes of action, Jafari and Fleets101 pointed to their loss of long-time customer Park West, which had provided annual revenue of \$200,000.

Prior to the hearing on July 3, 2018 the court provided the parties a tentative ruling denying the motion, indicating its initial view that Gastelum was not a prevailing party under Civil Code section 1717, subdivision (b)(2), and the misappropriation-related claims had not been made in bad faith. Following oral argument, the court took the matter under submission.

On August 3, 2018 the court issued a three-page ruling granting the motion. After a pro forma introductory sentence indicating the court had reviewed the briefs and considered the parties' arguments, the ruling stated, "Defendant's motion for attorney's fees is **GRANTED** in the amount of \$65,000.00. Cal Civ. Code § 3426.4."

In its ruling the court explained Civil Code section 1717, subdivision (a), provides for attorney fees to the prevailing party in an action, and Code of Civil Procedure section 1032, subdivision (a)(4), defines prevailing party to include a defendant

in whose favor a dismissal is entered. The court then stated, "Accordingly, Defendant qualifies as a prevailing party."

After discussing the objective and subjective standards for an award of attorney fees under section 3426.4, the court ruled, "The Court has reviewed the evidence submitted by the parties, and finds that [Jafari and Fleets101's] discovery responses, and allegations, do not support a finding that Defendant Gastelum either used or disclosed any of [their] trade secrets. Consequently, the Court concludes that [Jafari and Fleets101's] claims against [Gastelum] were made in bad faith."

Noting that Gastelum's counsel sought fees for 305.20 hours at \$650 per hour, the court determined reasonable fees were \$65,000—100 hours at \$650 per hour. The court explained it reduced the amount requested because "the hours recorded for this case are excessive and duplicative. Moreover, the litigation at issue does not involve complex or novel issues of law."

DISCUSSION

1. Governing Law and Standard of Review

Section 3426.4 provides in part, "If a claim of misappropriation is made in bad faith, . . . the court may award reasonable attorney's fees and costs to the prevailing party."

The full text of section 3426.4 provides, "If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees and costs to the prevailing party. Recoverable costs hereunder shall include a reasonable sum to cover the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably

"Although the Legislature has not defined 'bad faith,' our courts have developed a two-prong standard: (1) objective speciousness of the claim, and (2) subjective bad faith in bringing or maintaining the action, i.e., for an improper purpose." (FLIR Systems, Inc. v. Parrish (2009) 174 Cal.App.4th 1270, 1275.)

"Objective speciousness exists where the action superficially appears to have merit but there is a complete lack of evidence to support the claim." (FLIR Systems, Inc. v. Parrish, supra, 174 Cal.App.4th at p. 1276; see Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal.App.4th 1249, 1262 (Gemini) ["in enacting section 3426.4 the Legislature was concerned with curbing 'specious' actions for misappropriation of trade secrets, and such actions may superficially appear to have merit"].) Subjective bad faith "means simply that the action or tactic is being pursued for an improper motive. Thus, if the court determines that a party had acted with the intention of causing unnecessary delay, or for the sole purpose of harassing the opposing side, the improper motive has been found, and the court's inquiry need go no further." (Gemini, at p. 1263; see Cypress Semiconductor Corp. v. Maxim Integrated Products, *Inc.* (2015) 236 Cal.App.4th 243, 260 [a party brings an action in subjective bad faith if it is brought "for an improper purpose"].)

"An award of attorney fees for bad faith [under section 3426.4] constitutes a sanction [citation], and the trial court has broad discretion in ruling on sanctions motions.

[Citation.] 'Assuming some evidence exists in support of the factual findings, the trial court's exercise of discretion will not be disturbed unless it exceeds the bounds of reason. [Citation.] [¶]

necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the prevailing party."

In reviewing the facts which led the trial court to impose sanctions, we must accept the version thereof which supports the trial court's determination, and must indulge in the inferences which favor its findings." (*Gemini, supra*, 95 Cal.App.4th at pp. 1262-1263; see generally *Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 882 ["""The standard of review on issues of attorney's fees and costs is abuse of discretion. The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice."" [Citation.] As with all orders and judgments, this fee order 'is presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of affirmance"].)

2. The Motion for Attorney Fees Was Timely

California Rules of Court, rule 3.1702(b)(1)⁵ provides a notice of motion to claim attorney fees "must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108 in an unlimited civil case." Rule 8.104(a)(1) provides, with exceptions not relevant to this matter, that a notice of appeal must be filed on or before the earliest of (A) 60 days after the superior court clerk serves "a document entitled 'Notice of Entry' of judgment or a file-endorsed copy of the judgment, showing the date either was served"; (B) 60 days after a party serves "a document entitled 'Notice of Entry' of judgment or a file-endorsed copy of the judgment, accompanied by proof of service"; or (C) 180 days after entry of judgment.

⁵ References to rule or rules are to the California Rules of Court.

Jafari and Fleets101 argue Gastelum's motion for attorney fees, filed May 21, 2018, was untimely because it was filed and served more than 60 days after December 1, 2017, the date their counsel emailed Gastelum's lawyer a copy of their request for voluntary dismissal of the complaint. They contend the 60-day deadline specified in rule 8.104(a)(1)(B) applies to Gastelum's motion because "[t]here is no question that [Gastelum] knew of the entry of the dismissal without prejudice and was served a copy by email." But actual notice is not the standard set forth in in rule 8.104, and the requirements of that rule are to be strictly and literally applied. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 902-903; *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 260.)

Here, even assuming Jafari and Fleets101's use of email as a form of service was authorized, what they sent Gastelum's counsel was not captioned a "Notice of Entry," did not contain a file-stamped copy of the actual dismissal entered by the clerk, and did not include a proof of service. Accordingly, rule 8.104(a)(1)(C) applied, and Gastelum had 180 days from November 27, 2017 to file his motion. The motion for attorney fees filed 175 days after the November 27, 2017 dismissal of the complaint was timely.

3. Jafari and Fleets 101 Fail To Establish the Court Erroneously Awarded Fees Pursuant to Civil Code Section 1717

Emphasizing the reference in the trial court's ruling to Civil Code section 1717, subdivision (a),⁶ and the absence of any

⁶ Civil Code section 1717, subdivision (a), provides in part, "In any action on a contract, where the contract specifically

discussion of Civil Code section 1717, subdivision (b)(2),⁷ Jafari and Fleets101 contend the court erred in declaring Gastelum a prevailing party on any of the dismissed contract claims. However, they do not assert any of the 100 hours for which the court compensated Gastelum's counsel were directed to a defense of those claims. Accordingly, this argument has been forfeited. (See *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 488 ["General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice. . . . Because plaintiff did not point to the specific items challenged, with a sufficient argument and citations to the evidence, in support of its contention that the amount of awarded attorney fees was excessive, plaintiff forfeited this claim on appeal"].)

In any event, while the citation to Civil Code section 1717 is curious, the court's ruling as a whole, together with the court's findings as set forth in the parties' settled statement, makes clear the award of attorney fees was based entirely on its determination Jafari and Fleets101 had pursued their misappropriation claims in bad faith. As discussed, the court began its ruling by stating the motion was granted, citing only section 3426.4. Read in context, therefore, the brief discussion of

provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Civil Code section 1717, subdivision (b)(2), provides in part, "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

Civil Code section 1717 and Code of Civil Procedure section 1032 following that statement appears (albeit unnecessarily) to have simply served to confirm Gastelum was the prevailing party in the litigation. Then, without any discussion of Jafari's individual contract claims, the court analyzed the objective and subjective elements of bad faith for purposes of an award of attorney fees under section 3426.4 and completed that discussion with its award of fees to Gastelum, reduced for excessive and duplicative hours. Any doubt concerning this interpretation of the court's ruling is dispelled by the parties' settled statement, which provides (under the heading for the trial court's findings) that "Defendant qualifies as a prevailing party" without any reference to Civil Code section 1717.

- 4. Substantial Evidence Supports the Trial Court's Findings of Objective and Subjective Bad Faith
 - a. Objective bad faith

As discussed, the trial court found Jafari and Fleets101's pursuit of their variously styled misappropriation claims was objectively in bad faith because the information in their discovery responses was insufficient to support a finding that Gastelum either used or disclosed any of Fleets101's confidential information or trade secrets. (See *FLIR Systems, Inc. v. Parrish, supra*, 174 Cal.App.4th at p. 1276 [a complete absence of evidence to support misappropriation claim establishes objective bad faith].) Jafari and Fleets101 provided no evidence, either in their discovery responses or in opposition to the motion for attorney

The trial court's awareness that Civil Code section 1717, subdivision (b)(2), prohibits an award of contract-based attorney fees following voluntary dismissal of a lawsuit is apparent from its tentative ruling, which made that exact point.

fees, that the lists of Fleets101's customers or vendors were protected trade secrets with independent economic value (see Civ. Code, § 3426.1, subd. (d)(1) ["[t]rade secret" includes information that "[d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use"]), let alone that Gastelum, who had long experience in the truck service and repair industry, actually used that information to generate business for Custom Creations. The one concrete example Jafari and Fleets101 proffered, Fleets101's loss of Park West as a customer, was fatally flawed because Jafari and Fleets101 had no evidence that Park West became a Custom Creations client or that Gastelum ever attempted to solicit Park West's business.

Jafari and Fleets101 argue their discovery responses, while general, fall short of establishing they had no evidence of Gastelum's misuse of confidential customer lists. They also point out Gastelum did not follow up their written discovery responses with any additional discovery, including depositions of Jafari or any of the principals of Park West. Yet in their opening brief, explaining why Jafari decided to dismiss the lawsuit rather than file an opposition to Gastelum's motion for summary judgment, Jafari and Fleets101 concede they "did not have proper ammunition to win anything." On this record, applying the appropriate deferential standard of review for the trial court's factual findings, we necessarily affirm its determination the misappropriation causes of action were filed with objective bad faith.

b. Subjective bad faith

Gastelum contends the lawsuit was filed for an improper purpose: retaliation for his cooperation with former Fleets101 employees in DLSE proceedings. In support of this part of his motion for attorney fees, he cited allegations in the complaint, a portion of Jafari and Fleets101's discovery responses and aspects of a settlement proposal from Jafari that identify as damages sums paid to settle the DLSE complaints, as well as the attorney fees incurred because of those actions, none of which had anything to do with Gastelum's alleged theft and misuse of confidential customer and vendor lists. (See *Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc., supra,* 236 Cal.App.4th at p. 260 [an action brought for an improper purpose has been filed in subjective bad faith for purposes of section 3426.4].)

In response to this evidence of subjective bad faith, Jafari effectively conceded the DLSE proceedings motivated him to sue Gastelum, at least in part, but explained that, as operations manager, it was Gastelum's responsibility at Fleets101 to ensure that employees were properly paid in conformity with applicable labor laws and that the necessary documentation of those payments was maintained. Accordingly, the lawsuit, and in particular the cause of action for breach of fiduciary duty, sought to recover damages attributable to Gastelum's failure of managerial oversight.

The trial court resolved these conflicting interpretations of the evidence in favor of Gastelum. We accept the trial court's determination. (See *Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867 [applying the substantial evidence standard of review, "[i]f the evidence gives rise to

conflicting inferences, one of which supports the trial court's findings, we must affirm"]; see also *Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 868, fn. 1 ["our standard of review is substantial evidence, with due deference to the trial court's resolution of factual conflicts, regardless whether the evidence is oral or documentary"].)

DISPOSITION

The order awarding attorney fees is affirmed. Gastelum is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

FEUER, J.

DILLON, J.*

^{*} Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.